In The
Supreme Court of the United States

October Term, 1947

No. ~~580~~ ~~581~~ 147

INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS, PETITIONERS,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD; AND BRIGGS & STRATTON CORPORATION, A CORPORATION.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS BOARD, IN OPPOSITION

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QUESTION INVOLVED (Respondents' summary in correction of, and in addition to, the Petitioners' statements at pages 2 to 6 and page 10 of their petition for writ of certiorari)

The order of the state board for which review is sought has two cease and desist provisions. Apparently the petitioners challenge only the one set out in their petition

for certiorari. In order to support their challenge, however, they have quoted language of the Wisconsin court which applies *only* to the unchallenged provision. Furthermore, the challenged provision is misquoted at page 5 of the petition for certiorari. In order to aid in clarifying the confusion, we are here setting out verbatim the challenged and unchallenged provisions of the state board's cease and desist order (R. 127-128).

> "IT IS ORDERED that the respondent union, International Union, U. A. W. A.-A. F. L. and [its officers designated by name] shall:
>
> "1. Immediately and at all times hereafter while this order is in effect, cease and desist from:
>
> (a) Engaging in any concerted efforts to interfere with production by* arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.
>
> (b) Coereing or intimidating employes by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employes."

It is not a correct statement of the issue to say that the case involves the right of a labor union and its members to withhold services by leaving premises or refusing to enter upon premises for short periods of time at irregular

*At page 5 of the petition for writ the word "and" appears erroneously in lieu of the word "by."

intervals; but rather it involves the question what *conditions* may be imposed upon such withholding of services. The petitioners, in framing their issue, have not set out accurately the restraints imposed, but have given a distorted interpretation of the prohibition in their endeavor to invoke constitutional issues.

This court said in *Hotel & R. E. I. Alliance v. Wis. E. R. Board,* (1942) 315 U. S. 437, 440-441, 86 L. ed. 946, 62 S. Ct. 706:

> "* * * Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a rehearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court has of course the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it. *Aikens v. Wisconsin,* 195 U. S. 194; *Senn v. Tile Layers Union,* 301 U. S. 468. What is before us, therefore, is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. * * *"

The prohibition challenged by the petitioners, as construed by the state court, does not ban the various activities enumerated on page 15 of the petition for writ. It does not prohibit engaging in peaceful work stoppages, nor does it prohibit attending union meetings. It prohibits only concerted efforts to engage in a combination of these activities under certain specific and definite circumstances. The

Supreme Court of Wisconsin said of the challenged provision:

> "The order of the Board is criticized because it purports to ban employees from quitting work for the purpose of going to work elsewhere, or with intention of not resuming employment with the instant employer for whatever reason. The order has no such far-reaching effect * * *. What (a) does, *and all that it does* is to ban the individual defendants and the members of the union from *'engaging in concerted effort'* to interfere with production by doing the acts instantly involved." (R. 289) (Emphasis supplied)

The provision objected to expressly provides that it does not prohibit leaving the premises in an orderly manner for the purpose of going on strike. The petitioners allege that the Wisconsin court is in error on its classification of what constitutes a strike. We do not deem the Wisconsin court in error in that respect but, even if it were, that would not raise a federal question. There is no constitutional right to have certain activities called by a particular name. The only purpose for which the Wisconsin court's definition of what constitutes a strike is of any concern in this case is to determine the *substance* of the prohibition as interpreted by the Wisconsin court. The nomenclature used by the Wisconsin court is immaterial so long as the prohibited activities are defined.

The only federal question possible in the case is whether the prohibited activities, by whatever name they may be called, are ones which the federal constitution says may never be curtailed or conditioned.

If the petitioners prefer to designate the activities which were curtailed in this case as a strike, or as 27 sep-

arate strikes, even using that nomenclature the gist of the limitation upon the activities is constitutional, although we believe the Wisconsin court was entirely correct in stating that the activities were not strikes.

The Wisconsin court has said that all that is prohibited is what was done. As well as the limitation can be generalized without describing the activities in detail its gist is, regardless of nomenclature:

The petitioners may not in concert take over unilateral control of working hours, without notice, without avowal of objective and without relinquishment of control over the employment.

FACTS

A contract between the employer and International Union, U. A. W. A., A. F. of L., Local 232 (hereinafter called Local 232) expired July 1, 1944 (R. 241). After that time the employer and Local 232 negotiated for a new contract. They agreed on some points, but at the time of the events here involved had been unable to get together on an entire contract (R. 155, 157).

Among the matters upon which agreement had not been reached were the questions of maintenance-of-membership and check-off (R. 157, 165-166, 179). The record indicates that no referendum had been conducted, prior to the incidents here described, to legalize a maintenance-of-membership contract as required under sec. 111.06 (1) (c) of the Wisconsin statutes (R. 165-166); and the record does not show that conditions necessary to legalize the check-off under sec. 111.06 (1) (i) had been complied with.

The impression sought to be created by the petitioners at pages 2 to 3 of their petition for writ, to the effect that activities involved were for the purpose of enforcing a directive of the War Labor Board, is wholly unwarranted and misleading. No directive of the War Labor Board was served upon the employer until January 17, 1946 (R. 156) whereas the activities in this case commenced early in November 1945. The War Labor Board was abolished on January 1, 1946 by Presidential Order (Order #9672, 11 Fed. Reg. 221) at which time the emergency calling for application of a War Labor Board directive in lieu of other provisions of law was presumably ended. There was, therefore, no time during the activities involved in this case when a War Labor Board directive was in effect.

At a meeting of Local 232 held November 3, 1945, there was presented to the membership the question "what means of pressure is to be used on the company for a settlement" (R. 247). Anthony Doria, who is one of the officers of the international union with which Local 232 is affiliated, and who is also one of the trustees of Local 232, presented to the meeting what he deemed to be a new method of exerting economic pressure upon the employer, which "would avoid the hardship of strike" and which he recommended "to stave off" a strike (R. 177-178). Such new method involved short, frequently repeated work stoppages, ostensibly to attend special union meetings called by the executive committee, without advance warning to, or any specific demand upon, the employer (R. 158-159, 180, 242-246). In authorizing the procedure the term strike was not used, but a motion was adopted only "to empower the executive board to call a special meeting during working hours at any time they see fit" (R. 247).

The minutes of the meeting at which the procedure was authorized contain the following descriptive information about it:

> "* * * The most effective part in a stoppage of work is when you can leave work within a few minutes and the company will not be able to get out their schedules. *The old fashioned system of closing up the plant and go on a strike is past practice*, so let's use our heads and work on a sensible and workable program. If through our leaving work, the company decides to lock us out, then the employes can demand unemployment compensation" (R. 247). (Emphasis supplied.)

This device was regarded by union officers as a new and untried one (R. 236).

The purposes of the procedure and the features distinguishing it from a strike were described by a union officer in the following words:

> *"If you called this a new form of strike you would be making a bad mistake.* It's a labor weapon actually designed to avoid a strike and the hardships which a strike imposes on the workers. We think it's a better weapon than a strike" (R. 242).

> "Under the new method, meetings are called for any one or more of three possible reasons * * * any development in direct negotiations with management and finally, any time the leadership feels management has started a rumor detrimental to the union's security. * * *" (R. 243-244)

> "A fourth advantage * * * is the fact that it puts the company completely on the defensive" (R. 244).

> *"The meetings are called without warning, and take the company by surprise. They find it difficult to make commitments or plan production."* (R. 244)

"*This can't be said for the strike.* After the initial surprise of the walkout the company knows just what it has to do and plans accordingly * * *" (R. 244) (Emphasis supplied)

Local 232 carried the plan into effect by calling 27 meetings during working hours from November 6, 1945 to March 22, 1946 (R. 158-159) which resulted in work stoppages of a few hours each, without advance notice to, or any specific demand upon, the employer. The employees returned to work in each case at the usual time the following day (R. 158).

These unexpected work stoppages resulted in interference with production, made it impossible to meet deliveries (R. 161-162, 165) and caused an unusual turnover in employment because employees who were dissatisfied with the uncertainty in continuity of work and income left the employment entirely (R. 164, 185-186, 213).

In order to exercise pressure upon the employer, Local 232 also directed workers not to report for work on Saturdays (R. 163), although the employer had issued notice that work was to be scheduled on that day (R. 163). After failing to report for a number of Saturdays, half of the employees reported for work one Saturday (R. 164) without giving notice to the company so as to enable it to have materials ready for production. Following that occurrence, the company posted a notice that in view of the difficulty in scheduling work when there were unexpected stoppages, Saturday work would not be scheduled in any week in which there had been a work stoppage (R. 246).

The petitioners also threatened other employees with harm and inflicted damage upon their property in order

to coerce them into joining the foregoing stoppages. (R. 166, 184-186, 188-190, 192, 194-197, 198-199, 200, 202-204, 206, 207, 212-213, 215, 224).

ARGUMENT

I.

THE PROHIBITION INVOLVED DOES NOT INFRINGE UPON THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION (In reply to pages 16 to 29 of the petitioners' brief)

At the bottom of page 16 of petitioners' brief there has been quoted a statement from the decision of the Wisconsin Supreme Court that the order "operates on individual members of the union as well as the union's officers * * *." These words of the Wisconsin Supreme Court relate only to that portion of the order which is not here challenged, i.e., that portion restricting the petitioners from coercing or intimidating employees by threats of violence or other punishment to join their activities. Since no person either by himself or with others has a constitutional right to coerce and intimidate others by threats and violence, that prohibition can involve no constitutional question. In any event it is not challenged. The quoted words of the Wisconsin Supreme Court did not apply to the challenged prohibition. The latter is limited by its terms to "concerted efforts."

A.

The Prohibition does not Deprive the Petitioners of Rights Secured by the National Labor Relations Act (In reply to pages 17 to 20 of the Petitioners' brief)

Paragraph 7 of the National Labor Relations Act does not purport to protect anything other than lawful concerted activities. See for instance: *Hotel & R. E. I. Alliance v. Wis. E. R. Board,* (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706; *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154; *National Labor Relations Board v. Fansteel M. Corp.,* (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490; *National Labor Relations Board v. Draper Corp.,* (C. C. A. 4th, 1944) 145 F. 2d 199; *National Labor Relations Bd. v. Sands Mfg. Co.,* (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508.

Indeed in the only case in which a federal court has passed upon the type of activities here involved they were expressly held to be outside the protection of the National Labor Relations Act. See *C. G. Conn, Limited v. National Labor Relations Board,* (1939) 108 F. 2d 390. The petitioners in this case refused to permit employees to perform overtime work on Saturdays which is the identical situation involved in the foregoing case. There a union declined to permit its members to work overtime.

Generally speaking, concerted activities are unlawful, and therefore unprotected by any provision of federal law, if they are illegal either as to the means used or the objectives sought.

The petitioners have at page 17 of their brief referred to the finding of the Wisconsin Employment Relations

Board that the action of the employees was a concerted effort to exercise economic pressure to compel the employer to comply with the union's demands. The state board did not find, and could not have found, what demands were the objectives of the activities here involved. Many demands were made before, during, and after the activities; but the tenor of the finding was that what the petitioners sought to do by the activities was to "soften up" the employer so that it would be in the mood to accede to whatever demands might be made in the course of future bargaining. There is no question that the respondents had made many demands, and that they were constantly making new demands upon the employer even long after this series of walkouts had ceased (R. 157). There were, however, no specific demands communicated to the employer immediately prior to them. No one could have found as a fact what demands were made upon the employer, the refusal of which would result in work stoppages, because there was too much shifting of position by the petitioners. The testimony shows that no reason was known by the employer at the time of the walkouts why they occurred; that the employer was not told why the employees left the plant until much later (R. 158-159); that two or three walkouts had occurred before the employer was told *anything* about why they had occurred; and that at that time the employer was told that the only purpose was to attend union meetings; that about the middle of December the employer was informed the walkouts were spontaneous manifestations without union authorization (R. 160-161); that the employer was told repeatedly by members of the bargaining committee of Local 232 that they would not call a strike and that these activities were *not* strikes (R. 165); that at least

4 or 5 conferences between Local 232 and the employer were held after the commencement of the stoppages without any reference being made to them at all (R. 180); that some time after the tactics were well under way the employer was notified that it could be instrumental in avoiding walkouts if it "would quit starting rumors intended to undermine the union" (R. 181); that the stoppages were undertaken so that the union would have such control that when *anything* threatened the union's security it would be in a position to counteract (R. 179).

Together with the admitted fact that no notice of any kind was given the employer prior to any of the walkouts, the foregoing resume of testimony makes it clear that if the walkouts were intended to enforce compliance with any specific demands on the part of Local 232, the employer was not informed of that fact.

If it be urged that the concerted activities here involved were predicated on all demands previously made upon the employer, it must be conceded that the objective of the activities was illegal. They included, for instance, a maintenance-of-membership contract. Such a contract is now illegal under the Labor Management Relations Act in the absence of a vote by the employees affected, and was at the time of the activities here involved illegal under the Wisconsin law in the absence of such a vote. State laws restricting such contracts are valid under either the National Labor Relations Act or its successor, the Labor Management Relations Act of 1947. The conference report on the proposed Labor Management Relations Act, House Report 510, 80th Congress, page 60 reads:

> "'Under the House bill there was included a new section 13 of the National Labor Relations Act to as-

sure that nothing in the act was to be construed as authorizing any closed shop, union shop, *maintenance of membership*, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. *It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism.* Neither the so-called 'closed shop' proviso in section 8 (3) of the existing act nor the union shop and maintenance of membership proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect.' ". (Emphasis supplied)

During review proceedings in state courts, the petitioners asserted that they never insisted upon maintenance-of-membership, although the record shows clearly that it was one of the demands made before the series of work stoppages and that it had never been expressly abandoned. The shifting of position of the petitioners with respect to what their demands were, depending upon what position is currently most to their advantage, illustrates the need for such a limitation as that imposed by the order under review. The law throughout this country is uniform that coercive concerted action can be justified only by proper objectives. If the objectives of concerted action include

even one to which an employer may not lawfully accede, the concerted action is unlawful and improper.

> "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."
>
> 4 Restatement of the Law of Torts, sec. 794.

> "When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."
>
> 4 Restatement of the Law of Torts, sec. 796.

The existence of a valid objective, then, is essential to a lawful strike. The importance of determining the objective is discussed in 4 Restatement of the Law of Torts, Topic 2, p. 117 as follows:

> "*Significance of object.* The object of concerted action is an important factor in determining liability or non-liability for harm caused by the action. Some conduct, for example, physical violence, may be unprivileged in any case. Other conduct, for example, economic pressure by peaceful persuasion or otherwise, may be privileged for one object, such as an increase of wages, and unprivileged for another object, such as the committing of a crime. The nature of the object is, then, an important factor on the issue of liability, but it ordinarily is not the sole factor. Even when the object is proper there are limitations as to the kind of concerted action which may be taken to attain it. * * *"

The state order in this case requires in substance that persons engaging in coercive, concerted action make their position and their objective known. In no other way can it be determined whether activities and objectives are proper.

There is nothing infringing upon either the National Labor Relations Act or the Labor Management Relations Act in a requirement that the nature and the objective of concerted activities be avowed at the time of their inception.

B.

The Prohibition Involved in this Case does not Violate Section 13 of the National Labor Relations Act (In reply to pages 20 to 28 of Petitioners' brief)

Section 13 of the Wagner Act as quoted on page 20 of Petitioners' brief shows by its very wording that it was intended only as a rule to aid in the construction of the provisions of that act. It specifically says that "nothing *in this act*" shall be construed so as to interfere with the right to strike.

The petitioners devote many pages of their brief to the proposition that their activities should be classified as a strike, or as 27 strikes—*which* is not clear. Until they sought to raise a federal question, they asserted with equal vigor that they were not striking. If the intent of the participants has any bearing upon the classification of the activities, the petitioners did not engage in a strike. Their position was that if you called their activities "a new form of strike *you would be making a bad mistake.*" Anomalous as it now seems for the same persons to urge now that the same

activities *were* strikes, we will not argue that question here because the *substance* of the order as interpreted by the state court does not infringe upon any constitutional guaranties regardless of whether the activities be classed as strikes or otherwise.

The petitioners have quoted the Labor Management Relations Act on page 26 of their brief. The act was not in effect at the time the state court classified the activities. What bearing the petitioners contend that act could have on litigation that was completed before its enactment is not clear, but in any event we do not see how the consideration of the provisions of the latter act could strengthen the petitioners' position. Section 13 of that act, as in the case of the Wagner Act, provides that nothing in the act itself shall be construed to interfere with the right to strike. If it were urged to have any effect other than as an aid in construing the provisions of that law, then the latter part of the same section would have equal effect. It provides that nothing should be so construed as "to affect the limitations or qualifications on that right [to strike]."

The Labor Management Relations Act contemplates that states may place some limitations on the right to strike, when local welfare is involved. If Congress had not recognized that states should exercise some regulatory functions in connection with strikes occurring within their borders, the Labor Management Relations Act would not have provided in section 8 (d) (3) that the appropriate state authorities should be notified of disputes which might lead to strikes.

C.

The Scope of the Prohibition does not Conflict with any Rights Conferred by the Federal Law (In reply to pages 28 to 29 of the Petitioners' brief)

For the purposes of this argument we will assume that Congress could, if it chose, occupy the entire field of labor relations so as to preclude states from regulating in any manner with respect to employer-employee disputes. It has several times been held, however, that Congress did not do so in the enactment of the National Labor Relations Act. There has been no controversy in this case between any agencies of the state or federal government, nor has the state acted in a manner so as to conflict with substantive provisions of the federal law or to usurp the functions of any federal agency. No one has been commanded to do anything which the federal law prohibits him from doing, nor has he been prohibited from doing anything which the federal law requires him to do.

II.

THE STATE HAS MADE NO ATTEMPT TO COMPEL EMPLOYEES IN A LABOR DISPUTE TO PERFORM WORK NOR TO PREVENT THEM FROM PEACEFUL ASSEMBLY (In reply to pages 29 to 39 of the Petitioners' brief)

At page 30 of petitioners' brief they have reworded the cease and desist provisions of the state board's order to try to make it objectionable. The things prohibited by the order of the state board are limited by its own words

and by the further limitations placed upon it in the decision of the supreme court in which it was construed. The petitioners say for instance that "Technically, the refusal of a single member-employe to work part of a day * * * will subject him to punishment for contempt." That is absurd, because the prohibition applies only to "concerted action." The supreme court expressly so stated in answer to that contention which was made before it. The supreme court of Wisconsin said:

> "The order of the Board is criticised because it purports to ban employees from quitting work for the purpose of going to work elsewhere, or with intention of not resuming employment with the instant employer for whatever reason. The order has no such far-reaching effect either upon individuals or upon employees acting in concert. What (a) does, *and all that it does,* is to ban the individual defendants and the members of the union from *'engaging in concerted effort'* to interfere with production by doing the acts *instantly involved.*" (R. 289) (Emphasis supplied)

The petitioners state at page 30 of their brief that there are three separate types of activity which are prohibited by the order. A reading of the words of the prohibition will show that that is not true. The thing prohibited by the state board's order *is not any part of the whole but only a combination of all the enumerated circumstances.* The order does not prohibit the calling of union meetings but rather concerted efforts to interfere with production by arbitrarily calling union meetings *and* inducing work stoppages during regularly scheduled working hours *other* than by going on strike. The state court said all the order prohibits is the doing of the acts which were instantly in-

volved in this case. It does not prohibit calling of union meetings; it does not prohibit inducing work stoppages; it does not prohibit picketing and boycotting; it does not prohibit any *one* of these activities nor *all* of them unless they are combined in a concerted effort in the same manner as was here done. The banned activities were in effect a unilateral fixing of hours when employees would work (without at any time surrendering control over their jobs), without notice, without a declaration of intention to strike, and without making known the objectives of the activities, but rather upon fictitious pretexts.

A.

The Order Does not Violate the Thirteenth Amendment (In reply to pages 31 to 36 of the Petitioners' brief)

The state board's order does not ban any discontinuance of work, or refusal to report to work. It bans such acts only when done in conjunction with the other circumstances described in the order. The Wisconsin board made no attempt to prohibit striking; but made only certain *limitations* upon concerted refusal to work during certain hours without *any* quitting of employment, either temporary or permanent. The limitation seeks only to ease the impact of the labor dispute upon the public interest by requiring that the position of the parties be made known at the outset. Even if this be regarded erroneously as a limitation upon the right to strike, it would still not violate the 13th amendment.

The right to strike has never been declared immune from regulation. In *Dorchy v. Kansas,* (1926) 272 U. S. 306, 71 L. ed. 248, 47 S. Ct. 86, 87, the supreme court said through the words of Justice Brandeis:

> "* * * In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. * * * To enforce payment by a strike is clearly coercion. The Legislature may make such action punishable criminally, as extortion or otherwise. * * * And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. *Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.* Compare Aikens v. Wisconsin, 195 U. S. 194, 204-205, * * *" (Emphasis supplied)

Historically, it has been the right to strike which was doubted rather than the right of the government to curb it. The courts have been concerned primarily with whether, and under what circumstances, strikes could be deemed legal. They have said that employees are not liable for civil damage resulting from a strike for a *bona fide* and legal purpose; and that workmen may withdraw their services singly or in concert so long as they do not violate an express contract or statute.

See: 63 C. J. 665, sec. 17;

Restatement, Torts, sec. 797.

Even if we were to concede that strikes could not be prohibited by blanket enactment, it could still hardly be doubted that certain kinds of strikes could be outlawed, such as strikes for unlawful purposes, or strikes which inter-

fere with public safety, or which exceed the bounds of fair economic pressure.

With respect to the right to cease work a federal court said in *Western Union Tel. Co. v. International B. of E. Workers, Local Union No.* 134, *et al.*, (District Court, N. D. Illinois, 1924) 2 F. 2d 993, 994:

> "As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. *The right to cease work is no more an absolute right than is any other right protected by the Constitution.* Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to no one unless he has been guilty of a breach of contract. * * * These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it, they are not permitted to make an unlawful use of it."

In *People v. The United Mine Workers of America, District* 15, *et al*, (1921) 201 Pac. 54, 70 Colo. 269, in upholding a statute regulating strikes and lockouts in industries affected with a public interest, the court said:

> "There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason. * * *"

The case of *State ex rel. Hopkins v. Howat*, (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686, is another in which a law restricting strikes in certain industries was upheld. Writ of error was dismissed in *Howat v. Kansas*, (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

A law providing that strikes, to be permissible, must be preceded by an announcement of their purposes would surely not be deemed an invasion of a constitutional right. Such regulations as do nothing more than impose certain conditions in the interest of the public do not violate the constitution.

The restriction which is involved in the order before the court does not extend either to quitting work nor to striking. It is narrowly applied to a particular factual situation.

The petitioners have cited a number of cases to the general effect that striking is lawful. Generally speaking, we do not take issue with the proposition that, *in the absence of statutory restriction,* the right to strike exists subject only to the rules of tort.

The fact that an activity is lawful to the extent that it is not prohibited by statute does not mean that the constitution protects it from all regulation. If that were so, *any* law forbidding something that was permissible at common law would be unconstitutional.

The activities are not lawful even in the *absence* of statute unless supported by a valid objective. Unless we know the demand upon which the activities are predicated, it is impossible for us to know whether they would be lawful even in the absence of statute. An order requiring that coercive concerted activity may be predicated upon avowal of the position and objectives of the perpetrators is little more than a recognition of limitations that exist even in the absence of affirmative regulation.

B.

The Order does not Violate the Fourteenth Amendment (In reply to pages 36 to 39 of Petitioners' brief)

The only portion of the order which could be related to the right of assembly is that part which directs the union and its officers to cease and desist from engaging in any concerted efforts to interfere with production *by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours.* The provision does not prohibit the calling of union meetings *per se*, but only concerted interference with production by "*arbitrarily*" calling meetings to induce work stoppages. The term "arbitrary" is defined to mean:

> "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; * * *"
>
> (Funk & Wagnalls New Standard Dictionary of the English Language)

Certainly the constitutional guaranty to free assembly was not intended to permit it to be used fictitiously as a cloak for quite another illegal purpose. It was admitted by union officials that the plan worked out was not from a *bona fide* desire to hold union meetings but rather to procure work stoppages and thereby exercise economic pressure.

As ruled in *Hotel & R. E. I. Alliance v. Wis. E. R. Board,* (1941) 236 Wis. 329, 294 N. W. 632, 295 N. W. 634; aff. 315 U. S. 437, 52 Sup. Ct. 706, 86 L. ed. 946 (1942), orders are to be interpreted as applicable to the same type of circum-

stances as brought about their issuance. Under that rule it was held that an order might be entered restricting picketing generally, without any violation of the guaranty of free speech, because it would be construed to relate to the objectionable type of picketing which brought about its issuance. The calling of a *bona fide* meeting would not be deemed a violation of the order in the instant case, but only the use of the device of ostensibly calling a meeting as a signal for a totally different purpose.

III.

THE SUBSTANCE AND PURPOSE OF THE ORDER UNDER REVIEW ARE BENEFICENT (In reply to pages 39 to 42 of petitioners' brief)

For the purpose of discrediting the order under review the petitioners seek at pages 39 and 40 of their brief to attribute to it a significance and scope which is neither warranted by the words of the order itself nor the construction placed upon it by the court. We decline to quibble over terminology for the activities engaged in, although we are satisfied that they were not strikes. For purposes of determining whether any rights have been violated, the name assigned is immaterial. All we need know is what has been prohibited—which is the doing of "the acts instantly involved." *By whatever name they may be called, the prohibited acts were an attempt to take over unilateral control of working hours without notice, without avowal of position or objective, and without release of control over the means of production.*

The greater portion of the petitioners' argument under this heading is addressed to expediency and wisdom of the regulation. While these are not considerations bearing upon constitutional questions we believe the petitioners' arguments are unsound even in the field of policy.

It is suggested that the interests of the employer and the public suffer less from periodic interferences with production than from full-time strikes. Such a viewpoint is concerned only with immediate effects, and disregards the inroads which in the long run would be substantially more devastating to the flow of production.

The legislature is not so much concerned with the loss or impact on the employer or the group of consumers affected by one particular strike as it is with the total inroads which may be made over a period of time by adoption of unfair methods and practices. The legislature is not so much concerned with preventing interruptions of production as it is with insuring that the interruptions be based on some legitimate objective, and that such objective be made known so that the dispute can be judged by the community upon reason and merit rather than by sheer pressure. The ultimate goal is that controversies may tend to be determined by what is right than by who is mightier. No step can be taken in that direction unless the participants be required to make their positions known. The legislative belief is that *ultimate* industrial peace and continuance of production will be best served by evaluating tactics in terms of fairness than by degree of damage in one particular case. It is not unwise or inexpedient to require that industrial warfare be carried on openly enough so that it may be influenced by the light of informed public opinion.

In the long run interference with production can be better avoided by requiring that the position of the parties and the issues in dispute be brought into the open than by limiting the duration of a work stoppage.

CONCLUSION (In reply to pages 42 to 43 of Petitioners' brief)

There is nothing which can better save "our house of freedom," as it is termed by the petitioners, than to maintain standards of fair play and a reasonable balance between adverse interests. To permit unilateral dictatorship by any interest does not serve the cause of freedom.

The legislature has manifested a concern to see that employees should not be helpless and unprotected against arbitrary and unilateral action of the employer; on the other hand, it did not intend to permit unilateral and arbitrary action on the other side which would render individual employees and individual employers as helpless against the maneuvering of a strong international association of workers as the individual employee has formerly been against a powerful employer. While the employer in this case is not a small one, the majority of employers of labor in Wisconsin who are subjected to state regulation have less than 100 employees. If the procedure here utilized by Local 232 were held to be beyond the scope of regulation a strong organization might control, by arbitrary unilateral action, the working hours in any plant—particularly in small ones. There could be no protection of the public; and the interests of the consumer could be as effectively defeated by one master as another. The policy of preserv-

ing reciprocity in bargaining relations instead of unilateral action is in line with the policies adopted by Congress, and surely is not contrary to any constitutional guaranties.

Respectfully submitted,

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APPENDIX A (In reply to pages 45 to 46 of the Petitioners' brief)

Reference is made in the appendix of petitioners to sec. 111.06 (2) (e) of the Wisconsin statutes, relating to a strike vote. That provision is not involved in this petition. The state court *construed* the section, but no prohibition in the order was based upon it. The remedy applied is based solely on sec. 111.06 (2) (h); and as stated by this court in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, 315 U. S. 740, 62 S. Ct. 820, 824, 86 L. ed. 1154:

> "* * * we must read the state act for purposes of the present case as though it contained only those provisions which authorize the state board to enter orders of the specific type here involved. * * *"